Supreme Court, U.S.
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No. 94-1769

In the Supreme Court of the United States

OCTOBER TERM, 1994

JOHN F. MURPHY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, on the facts of this case, the United States has waived its sovereign immunity to petitioner's suit under 28 U.S.C. 1346(a)(1) or 26 U.S.C. 7433.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-11a) is reported at 45 F.3d 520. The order of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1995 (Pet. App. 1a). The petition for a writ of certiorari was filed on April 18, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Prior to 1972, petitioner and Edward Laffey formed a partnership known as Capeway Construction Company. Capeway failed to pay federal payroll taxes for the second and third quarters of 1972. At the end of 1972, when the partnership ceased doing business, its unpaid payroll tax liability was $9,442. The partnership's sole asset was a parcel of real estate located in Easton, Massachusetts, that had been acquired in 1971 for approximately $5,000. The property was subject to a mortgage (Pet. App. 3a).

In January 1974, the Internal Revenue Service made an assessment against the partnership for unpaid payroll taxes in the amount of $13,994. When the partnership failed to satisfy its obligation, the IRS looked to petitioner and Laffey who, as partners, were individually liable for the taxes (Pet. App. 3a). See 26 U.S.C. 6671(b).

In April 1974, the IRS served the partners with a notice of seizure of the Easton property. In August 1974, the IRS filed an action against petitioner and Laffey in federal district court to reduce the payroll tax liability to judgment. In July 1977, the district court entered judgment of $19,711 against petitioner and Laffey for the outstanding taxes, penalties, interest and costs. The court further ordered foreclosure and sale of the Easton property at a public auction to be conducted by the U.S. Marshal. The order specified that a minimum bid of $4,000 would be required at the auction and that, after paying the costs of the sale, the proceeds were to be applied first to satisfy the outstanding mortgage on the property, then to cover the costs of the United States in the

action and then to the outstanding tax judgment (Pet. App. 4a).

2. The U.S. Marshal made two unsuccessful attempts to sell the property in 1977. Over the next eight years, petitioner made no inquiries regarding the disposition or status of the property. In 1985, the Town of Easton foreclosed on the property pursuant to a final decree obtained in Massachusetts state court for failure to pay local real estate taxes (Pet. App. 4a-5a).

In December 1989, the IRS resumed its efforts to collect the judgment arising from the unpaid payroll taxes by issuing a notice of tax due to petitioner. The IRS sent another notice to petitioner in July 1990. In August 1990, petitioner made a payment to the IRS in the amount of $19,351. As a result of that payment, and other payments that were later applied, the judgment was satisfied in full (Pet. App. 5a).

3. In September 1990, petitioner filed a refund claim with the IRS, asserting that the seizure of the property and its ordered sale should have yielded proceeds adequate to satisfy the payroll tax liability. In March 1992, the IRS disallowed the claim. Petitioner thereafter filed this suit against the United States seeking a refund and damages for unauthorized collection actions pursuant to 28 U.S.C. 1346(a)(1) and 26 U.S.C. 7433. In the complaint, petitioner alleged that the government had exercised "dominion and control" over the property, had "breached its obligation to liquidate and/or dispose of the property in a reasonable manner" and had failed to keep him informed regarding the status of the property. The district court dismissed the suit for lack of subject matter jurisdiction (Pet. App. 5a).

4. The court of appeals affirmed (Pet. App. 2a-11a). The court noted that *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 209-211 (1983), held that ownership of seized property is not transferred until the property is sold to a bona fide purchaser at a tax sale. The ownership of the property thus remained with Capeway until the foreclosure by the Town of Easton (Pet. App. 8a). The court observed that petitioner's allegation that the IRS failed to keep him advised of the status of the property was not relevant because petitioner was put on notice by the minimum bid provision in the foreclosure order that the auction might not be successful (*id.* at 9a).

The court also noted that petitioner had not alleged facts to support his claim that the IRS exercised "dominion and control" over the property (Pet. App. 9a). The court explained that "Murphy has not alleged conduct analogous to taking title, insuring and renting the property, *see United States v. Pittman*, 449 F.2d 623, 627 (7th Cir. 1971), or negotiating a payment agreement directly with debtors on account receivables, *see Barlow's, Inc. v. United States*, 36 B.R. 826, 829 (Bankr. E.D. Va.), *aff'd*, 53 B.R. 986 (E.D. Va. 1984), *aff'd*, 767 F.2d 1098 (4th Cir. 1985)" (Pet. App. 9a). The court noted, moreover, that the latter cases did not consider or address whether a trial court would have jurisdiction over such claims in a tax refund suit (*id.* at 9a n.6). The court concluded that, "because Murphy's Complaint cannot be construed as asserting a claim for erroneous or illegal collection of taxes (as the IRS did not 'collect' the Property), Murphy's claim cannot be considered a tax refund suit. Accordingly, no jurisdiction exists under 28 U.S.C. § 1346(a)(1)" (Pet. App. 9a-10a).

The court of appeals also held that 26 U.S.C. 7433, which provides a cause of action against the United States in various tax collection circumstances, does not confer jurisdiction for petitioner's claim. The court noted that 26 U.S.C. 7433 applies only to actions occurring after November 10, 1988, the date of its enactment. Because the conduct of which petitioner complains occurred before that date, the court held that 26 U.S.C. 7433 is not applicable (Pet App. 10a-11a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The United States may not be sued without its consent, and the terms of its consent define the court's jurisdiction. *United States* v. *Dalm*, 494 U.S. 596 (1990); *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983); *United States* v. *Testan*, 424 U.S. 392, 399 (1976); *United States* v. *Sherwood*, 312 U.S. 584, 586-587 (1941). A waiver of sovereign immunity may not be inferred; any waiver of the government's immunity to suit must be explicit and is to be strictly construed in favor of the government. *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983); *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981) (quoting *Soriano* v. *United States*, 352 U.S. 270, 276 (1957)); *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979). A party who seeks to bring suit against the United States bears the burden of demonstrating that an Act of Congress specifically authorizes the court to entertain his particular claim. *McNutt* v. *General Motors Accep-*

tance Corp., 298 U.S. 178 (1936); *Lehigh Mining & Manufacturing Co.* v. *Kelly*, 160 U.S. 327, 337 (1895).

Petitioner brought this case as an action for a refund of taxes under 28 U.S.C. 1346(a)(1). That statute provides jurisdiction in the district courts over (*ibid.*)

> [a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

Petitioner contends (Pet. 10-17) that the facts of this case reflect that the government erroneously or illegally "collected" petitioner's liability when it seized the partnership's real property. According to petitioner, this result follows from the Fourth Circuit's decision in *United States* v. *Barlow's, Inc.*, 767 F.2d 1098 (1985), and the Seventh Circuit's decision in *United States* v. *Pittman*, 449 F.2d 623 (1971). Petitioner asserts that the holding of the court of appeals in the present case—that the government did not collect anything as a result of its seizure of the real property or the unsuccessful efforts of the U.S. Marshal to sell the property—conflicts with the decisions in *Barlow's* and *Pittman*. That contention is not correct.

a. In *Pittman*, the IRS served a notice of levy upon the taxpayer's nominee who held title to certain rental property belonging to the taxpayer. The nominee conveyed the property to the IRS by means of a quit-claim deed. The IRS thereafter insured the property and solicited tenants. Notices of levy were

served on the tenants, informing them that they should pay their rent to the IRS. Following the levy, the property deteriorated. Fifteen months after the IRS had received and recorded the deed to the property, the IRS sent a letter to the taxpayer advising him that he was the equitable owner of the real property and should take appropriate steps to maintain the value of the property and prevent waste.

The government argued in *Pittman* that it had seized only the rental payments and had not seized the real property itself. The taxpayer claimed, however, that the IRS had seized the real property and was required to sell it and apply the proceeds to his tax liability. The court of appeals agreed with the taxpayer (449 F.2d at 627):

> Where the Government serves notice of levy, compels transfer of legal title to itself and exercises the rights of an owner to control property by insuring it, renting it and compelling payment of rent to itself and no one else, so that the taxpayer justly concludes he has no further right to deal with the property, there has been an effective levy and seizure within the meaning of 26 U.S.C. § 6331 and the taxpayer is entitled to credit for the property seized.

In the present case, unlike *Pittman*, there is no allegation that the United States obtained record title, collected rents or otherwise exercised dominion and control over the property. The decision in *Pittman* is thus plainly distinguishable on its facts. Moreover, the decision in *Pittman* rested on the premise that seizure by itself is effective to convey title to the property to the government. 449 F.2d at 627. This Court subsequently held in *United States*

v. *Whiting Pools, Inc.*, 462 U.S. at 211, that "[o]wnership of [seized] property is transferred only when the property is sold to a bona fide purchaser at a tax sale." The reasoning of the court in *Pittman*, as well as the facts of that case, are thus inapplicable to the present case.

b. In *Barlow's*, the IRS seized an account receivable and, without the taxpayer's participation or knowledge, entered into an installment payment agreement with the debtor. After paying $27,000 of the $102,544 due under the account, the debtor defaulted. In subsequent bankruptcy proceedings, the taxpayer objected to the government's claim for the uncollected tax liability, asserting that credit should have been allowed for the full amount of the account receivable. The bankruptcy and district courts agreed with the taxpayer, reasoning that the IRS's exercise of complete dominion and control over the account precluded the taxpayer from obtaining full payment of the account. "[B]ased on these unique facts," the court of appeals affirmed. 767 F.2d at 1100.

As in *Pittman*, the government's exercise of dominion and control over the seized property in *Barlow's* serves to distinguish that case from the present case.* Here, as in *Cash* v. *United States*, 961 F.2d 562,

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* As the court of appeals observed (Pet. App. 9a n.6), neither *Barlow's* nor *Pittman* was a suit for tax refund. *Barlow's* arose from a motion in a bankruptcy case challenging a tax lien (767 F.2d at 1100) and *Pittman* arose from an action brought by the United States to foreclose tax liens (449 F.2d at 624). Even if *Barlow's* and *Pittman* were not factually distingushable from the present case, those decisions do not conflict with the holding in this case that 28 U.S.C. 1346(a)(1) does not waive sovereign immunity for such relief in a tax refund case.

567-568 (5th Cir.) (seizure of receivables does not, by itself, transfer ownership to the government), cert. denied, 113 S. Ct. 492 (1992), *Barlow's* is distinguishable because the IRS did not exercise dominion and control over the taxpayer's property.

It is undisputed that the government did not actually collect anything as a result of the seizure of the property in the present case. See Pet. 14. Petitioner has thus not paid the tax twice, and there is no overpayment of tax. What petitioner seeks, in essence, is damages for an alleged breach of duty to make a prompt sale of the real property. As the court of appeals recognized (Pet. App. 10a), however, 28 U.S.C. 1346(a)(1) does not constitute a waiver of sovereign immunity for suits sounding in tort. See *Schon* v. *United States*, 759 F.2d 614, 617 (7th Cir. 1985) ("a taxpayer cannot rely on section 1346(a)(1) to bring suit alleging that the I.R.S. did not sell his assets so as to maximize the sale price and to minimize his remaining debt for unpaid taxes"); *Cleveland Chair Co.* v. *United States*, 526 F.2d 497, 498-499 (6th Cir. 1975).

2. 26 U.S.C. 7433(a) provides that a civil action for damages may be brought against the United States "[i]f, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of" the Internal Revenue Code or any regulation promulgated thereunder. Section 7433 was enacted on November 10, 1988. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6241(a), 102 Stat. 3747. The enacting legislation provides that Section 7433 "shall apply to actions by officers or employees of the

Internal Revenue Service after the date of the enactment of this Act." § 6241(d), 102 Stat. 3749.

Petitioner's complaint alleged that the government's seizure of the Easton property and the subsequent attempted sales of that property by the U.S. Marshal violated Section 7433. Without regard to the merits of such claims, the allegedly offending actions took place prior to November 10, 1988. Petitioner's claims are therefore barred by the effective date provision of the statute, as the court of appeals correctly held (Pet. App. 10a-11a).

The decision in this case is not, as petitioner maintains (Pet. 19), "directly at odds" with *Gonsalves* v. *United States*, 782 F. Supp. 164 (D. Me.), aff'd, 975 F.2d 13 (1st Cir. 1992). In *Gonsalves*, as in the present case, the First Circuit held that a cause of action did not exist under Section 7433 where the action complained of (a levy) occurred prior to November 10, 1988. 975 F.2d at 16-17. Moreover, even if petitioner's assertion of an intra-circuit conflict were correct, it would not be an adequate basis for further review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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